Supreme Court, U.S.
FILED
JUL 22 1999
OFFICE OF THE CLERK

No. 98-2050

In The

Supreme Court of the United States

ANTHONY N. MATTEO,

Petitioner,

vs.

SUPERINTENDENT, SCI ALBION, CHESTER COUNTY DISTRICT ATTORNEY AND ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STUART B. SUSS, ESQUIRE
Deputy District Attorney
Counsel of Record

NICHOLAS J. CASENTA, JR., ESQUIRE
Deputy District Attorney

ANTHONY A. SARCIONE, ESQUIRE
District Attorney

17 North Church Street, Suite 218
Post Office Box 2748
West Chester, PA 19380-0991
(610) 344-6801

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REASONS FOR DENYING THE WRIT

Respondent contends that the statutory amendments to 28 U.S.C. § 2254 were intended to work a substantial change in habeas corpus review of state criminal convictions. The conclusion that Congress intended a substantial change in prior law is a conclusion shared by most, if not by all, of the courts of appeal which have construed the statute.[1] Most significantly however, such was also the conclusion of this Court.[2]

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[1] *O'Brien v. Dubois*, 145 F.3d 16, 20 (1st Cir. 1998) ("fundamental modification to habeas corpus jurisprudence"); *Green v. French*, 143 F.3d 865, 868 (4th Cir. 1998) ("new standards for federal habeas corpus"); *Harpster v. State of Ohio*, 128 F.3d 322, 326 (6th Cir. 1997) (The statute "altered the standard of review that a federal court must employ. . . . "); *Drinkard v. Johnson*, 97 F.3d 751, 767 (5th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1114, 137 L.Ed.2d 315 (1997) ("Subsection (d) limits the ability of the federal courts to grant habeas relief to state prisoners."); *Lindh v. Murphy*, 96 F.3d 856, 865 (7th Cir. 1996), *rev'd on other grounds*, ___ U.S. ___, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) ("[T]he amended 2254(d) is designed to curtail collateral review and augment the finality of judgments. . . . ").

[2] *Felker v. Turpin*, 518 U.S. 651, 662-663 (1996) (footnote omitted) ("Title I of the Act has changed the standards governing our consideration of habeas petitions by imposing new requirements for the granting of relief to state prisoners. Our authority to grant habeas relief to state prisoners is limited by [28 U.S.C.] § 2254, which specifies the conditions under which such relief may be granted to 'a person in custody pursuant to the judgment of a State court.' § 2254(a). Several sections of the Act impose new requirements for the granting of relief under this section, and they therefore inform our authority to grant such relief as well."). *See also, Lindh v. Murphy*, ___ U.S. ___, ___ n.7, 117 S.Ct. 2059, 2066 n.7, 138 L.Ed.2d 481, ___ n.7 (1997) ("new, highly deferential standard for evaluating state court rulings").

Congress has instructed federal habeas courts to change their inquiry from whether the federal habeas court agrees with the state court's application of constitutional principles to the very different inquiry whether the federal habeas court is prepared to say that the state court's application of constitutional principles to the case at hand was unreasonable.[3] It is Respondent's position that by this statute Congress intended to codify the plurality opinion by Justice Thomas in *Wright v. West*.[4]

Upon final passage, the new legislation stated the following:

> An application for a Writ of Habeas Corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings. . . .

To that basic principle was appended the proviso, "unless." What follows are, substantively (even if not structurally), three exceptions to the basic principle. Habeas corpus relief was to be granted if the state court adjudication of the constitutional claim "resulted in a

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[3] *In Wright v. West*, 505 U.S. 277 (1992), only a plurality of the Court was prepared to remove *de novo*, review from mixed questions of law and fact. In *Thompson v. Keohane*, 516 U.S. 99 (1995), a majority of the Court afforded *de novo* review to a mixed question of law and fact. This is undisputed. However, Congress intended to change and did change the standard of review for mixed questions of law and fact. Congress did not engage in a long and acrimonious debate merely to codify the existing judicial statutory construction.

[4] 505 U.S. 277 (1992) (Thomas, J. joined by Rehnquist, C.J. and Scalia, J.).

decision that was contrary to . . . clearly established Federal law as determined by the Supreme Court of the United States. . . . " or "resulted in a decision that. . . . involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States. . . . " or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State proceeding."

The position of respondent is that these three exceptions apply, respectively, to pure questions of law, mixed questions of law and fact, and pure questions of fact. Such was the conclusion by panels of three circuit courts of appeal.[5]

This reading is not only supported by the legislative history,[6] but also is a fair reading of the statutory language itself. Habeas Corpus review is permitted in cases of an unreasonable "application" of clearly established Federal law as determined by the Supreme Court of the

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[5] *Neelley v. Nagle*, 138 F.3d 917 (11th Cir. 1998); *Drinkard v. Johnson*, 97 F.3d 751 (5th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1114, 137 L.Ed.2d 315 (1997); *Lindh v. Murphy*, 96 F.3d 856, 865 (7th Cir. 1996), *rev'd on other grounds*, ___ U.S. ___, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).

[6] "Unless it is unreasonable, a State court's decision applying the law to the facts will be upheld." 142 Cong. Rec. S3472 (April 17, 1996) (statement of Senator Specter). In opposing the provision, Senator Biden argued that, if adopted, "a claim can be granted only if the State court's application of Federal law to the facts before it was unreasonable, not merely wrong, but unreasonable." 141 Cong. Rec. S7842 (June 7, 1995).

United States. What are mixed questions of law and fact other than the "application" of law to the facts?

Congress promulgated two separate and distinct standards, one which permits relief when a state court constitutional decision is "contrary to" clearly established law, and a second which permits relief when a state court constitutional decision is an "unreasonable application" of clearly established law. As noted by the Eleventh Circuit,[7] any statutory construction must give full effect to both standards:

> On one hand, it is difficult to imagine a decision "contrary to" existing Supreme court precedent that does not "involve an unreasonable application" of law. On the other hand, a federal court reviewing a state court decision in the context of a habeas petition could read the "contrary to" language as permitting issuance of the writ whenever a state court errs, thereby vitiating the "unreasonable application" clause. Our interpretation of the statute, however, should not nullify either clause, but should give effect to both.

The First Circuit[8] is in agreement, rejecting the construction suggested by Professor Yackle:[9]

> The [Yackle] formulation – a focus-shifting approach – suffers from a different, but equally debilitating infirmity. The argument in support

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[7] *Neelley v. Nagle*, 138 F.3d 917, 923 (11th Cir. 1998).

[8] *O'Brien v. Dubois*, 145 F.3d 16, 23 (1st Cir. 1998) (citations omitted).

[9] Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buff. L. Rev. 381, 439-443 (1996).

> of the approach holds that the disjunctive phrasing of section 2254(d)(1), literally read, furnishes habeas petitioners with a choice to seek review of their convictions under either the "unreasonable application" clause or the "contrary to" clause. This interpretation effectively reads the "unreasonable application" language out of the statute, for that language sounds much more tolerant of state courts' rulings than does the "contrary to" language, and, thus, no rational petitioner would opt for it in practice. Indeed proponents of the focus-shifting approach unabashedly admit that their formulation nullifies the statute's unreasonable application language.
>
> The minimalist focus-shifting approach substitutes the proponents' policy choices for the legislative will, and is therefore unacceptable. Statutory interpretation is not a game designed to find linguistic loopholes as a means to subverting Congress' discerned intentions. Rather than reading words out of a statute, courts should strive to give every word in a statute meaning and effect. So it is here: we must interpret section 2254(d)(1) in such a way as to give purpose to both of its clauses.

Respondent respectfully submits that the Fourth Circuit and the First Circuit have improperly blurred the boundaries between those issues reviewable under the "contrary to" language and those issues reviewable under the "unreasonable application" language. The Fourth Circuit has proposed the following standard:[10]

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[10] *Green v. French*, 143 F.3d 865, 869 (4th Cir. 1998) (emphasis added). It was the *Green v. French* standard that was

> A lower court's decision, for example, certainly is said to be "contrary to" supreme court precedent when, through resolution of a question of pure law, that decision reaches a legal conclusion or a result opposite to that reached in a supreme court opinion which addresses the identical question of law. A lower court's decision is likewise "contrary to" a higher court's precedent when that decision correctly identifies the governing legal principle from the precedent but **applies** that principle to facts that are indistinguishable in any material respect from those on the basis of which the precedent was decided in such a way as to reach a conclusion different from that reached by the higher court. It is also common to characterize a lower court decision as "contrary to" supreme court precedent when that decision **applies** a precedent in a factual context different from the one in which the precedent was decided and one to which extension of the legal principle of the precedent is indisputably unjustified, or, conversely, when that decision fails to **apply** a precedent in a different context to which the precedent's principle clearly does **apply**.

Respondent respectfully disagrees. As is evident from the words which have been emphasized in the quoted excerpt from the court's ruling, the Fourth Circuit has recognized that legal precedents and legal principles are **applied** from a precedent-setting Supreme Court case to the factual context of a subsequent state criminal case.

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followed in the case currently pending before this Court, *Williams v. Taylor*, 163 F.3d 860 (4th Cir. 1998), *cert. granted*, 119 S.Ct. 1355, No. 98-8384 (1999).

A federal court in a section 2254 proceeding may conclude that the facts in the state criminal case are so materially indistinguishable from the precedent-setting Supreme Court case as to justify the same legal ruling. If the state court failed to **apply** the clearly established Supreme Court law to legally indistinguishable facts, then the state court has engaged in an "unreasonable application" (or an unreasonable non-application) of clearly established law. A grant of habeas corpus relief would be appropriate, but only pursuant to the "unreasonable **application**" clause, not the "contrary to" clause. The "contrary to" clause would provide the basis for relief only if the state court articulated an incorrect legal standard and erred on a pure question of law.[11]

Habeas corpus review of a state court constitutional ruling should consist of the following evaluations.

> Did the state court articulate the applicable "clearly established Federal law as determined by the Supreme Court of the United States?" If not, then the state court constitutional ruling is "contrary to" that clearly established Federal law.
>
> If the state court articulated the applicable "clearly established Federal law as determined

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[11] This concept has already been recognized by three Justices of the Court in the *Teague v. Lane*, 489 U.S. 288 (1989), context. "If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and any deviation from the precedent is not reasonable." *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, J. concurring in the judgment, joined by Blackmun and Stevens, JJ.).

> by the Supreme Court of the United States," and if the state court is challenged as to its application of that clearly established Federal law to the facts and record of the instant case, then the habeas court must determine whether the state court engaged in an "unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States."
>
> Did the state court make an "unreasonable determination of the facts in light of the evidence presented in the State proceeding?"

One purpose behind the requirement that relief may be granted only for decisions which are "contrary to" or an "unreasonable application" of "clearly established" law is an extension of the philosophy of *Teague v. Lane*.[12] *Teague* provided, with two exceptions, that habeas corpus relief may not be granted based on a constitutional principle which is first announced after the petitioner's conviction and sentence have become final. In the absence of one of the two exceptions,[13] the habeas court is to deny relief unless the legal principle advanced by petitioner was dictated by precedent existing at the time the

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[12] 489 U.S. 288 (1989).

[13] The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe, or addresses a substantive categorical guarantee accorded by the Constitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense. The second exception is for watershed rules of criminal procedure implicating the fundamental accuracy of the criminal proceeding. *Lambrix v. Singletary*, 520 U.S. ___, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997).

defendant's conviction became final.[14] The result is not dictated if the legal principle advanced by petitioner was "susceptible to debate among reasonable minds."[15]

The *Teague* doctrine "validates **reasonable**, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions,"[16] and "serves to ensure that gradual developments in the law over which **reasonable jurists** may disagree are not later used to upset the finality of state convictions, valid when entered."[17]

Therefore, those federal habeas courts which focus their analysis upon whether the state court application of constitutional principles was that application which would have been made by a reasonable jurist,[18] are

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[14] *Butler v. McKellar*, 494 U.S. 407 (1990).

[15] *Butler v. McKellar*, 494 U.S. 407, 415 (1990).

[16] *O'Dell v. Netherland*, ___ U.S. ___, ___, 117 S.Ct. 1969, 1973, 138 L.Ed.2d 351, ___ (1997) (emphasis added); *Saffle v. Parks*, 494 U.S. 484, 488 (1990) (emphasis added); *Butler v. McKellar*, 494 U.S. 407, 414 (1990) (emphasis added).

[17] *Sawyer v. Smith*, 497 U.S. 227, 234 (1990) (emphasis added).

[18] *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998) (citing with approval *Drinkard v. Johnson, infra.*); *Neelley v. Nagle*, 138 F.3d 917, 924 (11th Cir. 1998) (adopting standard from *Drinkard v. Johnson.*); *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1114, 137 L.Ed.2d 315 (1997) (emphasis in original) ("[A]n application of law to facts is **unreasonable** only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. In other words, we can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists.").

properly relying upon a well-established principle of habeas corpus law. Other courts, while not relying upon the concept of the reasonable jurist, nevertheless recognize that Congress has now extended the philosophy of *Teague* from cases involving changes in principles of law to cases involving the application of settled principles of law to novel fact situations.[19]

Petitioner erroneously argues for an exact identity between a *Teague* review and the statutory review under the amended Section 2254. Petitioner misconstrues the

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[19] *O'Brien v. Dubois*, 145 F.3d 16, 25-26 (1st Cir. 1998) (citation and internal quotations omitted) ("We think it is pellucid, however, that the unreasonable application clause does not empower a habeas court to grant the writ merely because it disagrees with the state court's decision, or because, left to its own devices, it would have reached a different result. Rather, for the writ to issue, the state court decision must be so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes. *Cf. Butler v. McKellar*, 494 U.S. 407, 414 (1990) (noting that the *Teague* rule evolved in an effort to uphold a state court's reasonable, good faith interpretations of existing precedents.")); *Lindh v. Murphy*, 96 F.3d 856, 870 (7th Cir. 1996), *rev'd on other grounds*, ___ U.S. ___, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) (suggesting that purpose of "unreasonable application of" clause is, not unlike *Teague*, to "validate[ ] reasonable, good-faith interpretations of existing precedents made by state courts"); *Id.* at 871 ("The Supreme Court of the United States sets the bounds of what is 'reasonable'; a state decision within those limits must be respected – not because it is right . . . but because the grave remedy of upsetting a judgment entered by another judicial system after full litigation is reserved for grave occasions.").

import of Justice Kennedy's analysis from *Wright v. West*:[20]

> *Teague* does bear on applications of law to fact which result in the announcement of a new rule. Whether the prisoner seeks the application of an old rule in a novel setting depends in large part on the nature of the rule. If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. The rule of *Jackson v. Virginia*, 443 U.S. 307 (1979) [pertaining to federal habeas corpus challenges to the sufficiency of state court evidence], is an example. By its very terms it provides a general standard which calls for some examination of the facts. The standard is whether any rational trier of fact could have found guilt beyond a reasonable doubt after a review of all the evidence, so of course there will be variations from case to case. Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.

Justice Kennedy quite correctly identified one area of the law, sufficiency of the evidence, where a clearly established Federal constitutional standard is applied to the facts of a state criminal case by a habeas court. Each state criminal case, inevitably, has a unique factual record to

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[20] 505 U.S. 277, 308-309 (Kennedy, J. concurring in the judgment) (citation omitted).

which the clearly established Federal constitutional standard is applied. Other areas in which a clearly established Federal constitutional standard is applied in a fact-specific context are claims of ineffective assistance of counsel[21] or claims regarding the failure to disclose material exculpatory evidence.[22]

As Justice Kennedy correctly noted, the **application** of settled law to a factual context is not a new rule for purposes of *Teague* analysis. However, in a Section 2254 proceeding, the **application** of settled law to a factual context does not require plenary habeas review under the "contrary to" provision of the statute. Instead, the habeas court is to decide whether the state court's **application** to a factual context of "clearly established Federal law as determined by the Supreme Court of the United States" was an "unreasonable **application**." That is the deferential review called for by the amended statute.

Respondent has set forth its suggested statutory construction so as to more fully establish the principal reason why the Court in the instant case should deny review. The several opinions of the *en banc* court below all applied a standard of review that was less deferential to the state court constitutional analysis in the instant case than respondent believes is the amount of deference compelled by the statutory language and legislative history.

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[21] *Strickland v. Washington*, 466 U.S. 668 (1984).

[22] *Kyles v. Whitley*, 514 U.S. 419 (1995).

This case is one in which the clearly established constitutional doctrines of *Massiah v. United States*[23] and its progeny were applied in a fact specific context to answer the questions as to whether Douglas Lubking was a government agent and whether Douglas Lubking deliberately elicited admissions from Anthony Matteo. The only question before a habeas court under the amended statute is whether the Pennsylvania courts unreasonably applied the applicable law to the facts and record of the instant case.

Even while applying varying, insufficiently deferential, standards of review, nine of the twelve judges below concluded that there was no constitutional error in the state court ruling.[24] Three judges, applying the least deferential standard, concluded that constitutional error was present but that such error was harmless.[25] Unless the Court in *Williams v. Taylor* promulgates a standard of review that is even less deferential to the state court, the result in the instant case will be unchanged. The maximum relief to which Petitioner is entitled would be that this case be held pending the decision in *Williams v. Taylor* and that the case then be remanded for reconsideration in light of the newly promulgated standard.

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[23] 377 U.S. 201 (1964).

[24] *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877 (3rd Cir. 1999) (en banc) (per Scirica, J. joined by Greenberg, Alito, Roth, Cowen JJ.); *Id.* at 898 (Becker, C.J. joined by Nygaard, J. concurring); *Id.* at 902 (Stapleton, J. concurring); *Id.* at 909 (Rendell, J. concurring).

[25] *Id.* at 905 (McKee, J. joined by Sloviter, Roth JJ. concurring).

All questions as to the meaning of the statute are presented in *Williams v. Taylor*. No question as to the meaning of the statute is presented in the instant case that will not be presented and decided in the case already before the Court for review.

Much of the debate within and between the various courts of appeal pertaining to the construction of this statute has focused upon the question as to when a state court constitutional ruling is to be analyzed with respect to the "contrary to" language of the statute and when it is to be analyzed with respect to the "unreasonable application" language of the statute. The courts of appeal have struggled greatly by posing to themselves the question as to how much "on point" a precedent of this Court must be for a state court decision to be "contrary to" that precedent.[26] That question only arises because certain courts of appeal have failed to recognize that all mixed questions of law and fact are to be analyzed pursuant to the "unreasonable application" provision of the statute once the state court has correctly recognized and applied the clearly established Federal law.

The opinion of the trial judge, Chester County Pennsylvania Common Pleas Court Judge, Charles B. Smith, was handed down on March 14, 1990. The opinion and order of the Superior Court of Pennsylvania, affirming the judgment of sentence of the Court of Common Pleas of Chester County, was filed on February 12, 1991. Both

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[26] *O'Brien v. Dubois*, 145 F.3d 16, 24 (1st Cir. 1998) ("[T]he chief question is how specific a rule must be to qualify as dispositive, thus triggering review under the 'contrary to' clause.").

courts applied the correct legal doctrine from *Massiah v. United States*; specifically, that "law enforcement officials are prohibited from deliberately eliciting incriminating information from a defendant after indictment and without the presence of counsel."[27] Matteo's argument is not that the state courts used the incorrect legal standard; rather, Matteo claims that *Massiah* was not correctly applied to the specific facts surrounding his two recorded conversations with Douglas Lubking. As argued earlier in this Brief in Opposition, because the correct legal standard was used, and because the issue before this court pertains to the application of that legal standard to the facts, this case is to be decided under the "unreasonable application of" rather than the "contrary to" provision of the statute.

In the court below, respondent argued the following:

1. The Sixth Amendment right to counsel had not attached at the three separate times Matteo called to the prison to speak with Douglas Lubking, including the two times that the conversations were recorded.

2. Douglas Lubking was not an agent as that term is used in Sixth Amendment law.

3. Douglas Lubking did not deliberately elicit any incriminating statements from Matteo.

4. In any event, the admission of the testimony by Lubking and of the rifle, was, if error at all, harmless error.

Petitioner argues at great length why the state court's and/or the third circuit's Sixth Amendment analysis is

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[27] February 12, 1991 Opinion of the Superior Court of Pennsylvania at 5.

incorrect. However, that is not the issue which a section 2254 court is called upon to decide. The issue now before this Court is whether the trial court and the Superior Court of Pennsylvania engaged in an "unreasonable application" of *Massiah* and its progeny. For the reasons subsequently stated, respondent argues that *Massiah* was reasonably applied to the instant facts.

Matteo had been arrested and preliminary arraigned. He had not yet appeared at his preliminary hearing. At a Pennsylvania preliminary arraignment, the defendant is served with a copy of the arrest warrant or criminal complaint, informed of his right to counsel, notified concerning the scheduling of a preliminary hearing, and provided information as to the possibility of release on bail.[28] Because at the time of the telephone calls adversary judicial proceedings had not commenced, and the Sixth Amendment right to counsel had not attached.[29] The state courts did not address this issue.[30]

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[28] Pa.R.Crim.P. 140.

[29] *Moran v. Burbine*, 475 U.S. 412 (1986) (Sixth Amendment right to counsel has not attached even if counsel has been retained by the suspect.); *United States v. Gouveia*, 467 U.S. 180 (1984); *United States v. Muzychka*, 725 F.2d 1061 (3rd Cir.), *cert. denied*, 467 U.S. 1206 (1984).

[30] The state courts apparently assumed that the right to counsel had attached under Pennsylvania law pursuant to *Commonwealth v. Richman*, 458 Pa. 167, 328 A.2d 351 (1974). For this Court, in the absence of any state court analysis, the determination of when the right to counsel attaches is a federal question answered pursuant to federal constitutional law.

This Court has assumed, without explicitly deciding the issue, that *Teague v. Lane* survives the enactment of the new statute, at least where the federal issue was not raised in the

The Superior Court of Pennsylvania did not apply the law unreasonably in concluding that Douglas Lubking was not a government "agent" as that term has been defined in Sixth Amendment law. The decisions of this Court granting Sixth Amendment relief have held a person to be an agent either when he was a cooperating accomplice receiving a benefit on pending charges[31] or a professional informant receiving financial compensation for his information.[32] The Superior Court of Pennsylvania's conclusion that Douglas Lubking was not an agent was a reasonable conclusion in light of the factual findings of the trial court,[33] and in light of the rulings by

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state court. *Breard v. Greene*, 523 U.S. ___, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998). In that case Breard, a citizen of Paraguay, argued that his federal right under a treaty, the Vienna Convention on Consular Relations, was violated when the arresting authorities failed to inform him that he had a right to contact the Paraguayan Consulate. This claim was procedurally defaulted in state court. The Supreme Court noted that even if not procedurally defaulted, the claim for relief based on the treaty would be barred under *Teague v. Lane*.

With the understanding that *Teague v. Lane* is still viable with respect to the question, not addressed by the state court, as to whether Matteo's Sixth Amendment right had attached as of the time of his telephone conversations with Douglas Lubking, Respondent respectfully argues to the Court that any attempt to apply the Sixth Amendment to the facts of this case, and to events which occurred prior to any commencement of adversary judicial proceedings against Matteo, would constitute a new law and be *Teague* barred.

[31] *Maine v. Moulton*, 474 U.S. 159 (1985); *Massiah v. United States*, 377 U.S. 201 (1964).

[32] *United States v. Henry*, 447 U.S. 276 (1980).

[33] "There was no agreement or prior arrangement between Lubking and the District Attorney or the police; Lubking did not

other courts which have defined the term "agent" and reached similar conclusions.[34]

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receive any compensation for the information he provided; he had no history of acting as a paid informant; and Lubking went to the police of his own volition after he has initially been contacted by the Defendant on January 28, 1998." March 14, 1990 Opinion of the Honorable Charles B. Smith at 10-11.

It is important for the Court to recognize that Douglas Lubking was not a cooperating accomplice. He was not a professional or otherwise compensated jail house informant. Douglas Lubking was not charged with any crime and he was not seeking any benefit from the police in return for his cooperation. Douglas Lubking was a civilian who had loaned his rifle to Matteo less than one month before the murder. After the murder, out of the blue, Matteo called Douglas Lubking from prison and attempted to persuade Douglas Lubking that although the rifle was not connected to the murder, Lubking should retrieve the rifle, hide the rifle in his house, and lie to either the police or Matteo's own attorney if anyone asked about the rifle. Lubking was a good citizen who contacted the police after Matteo first contacted him. One of the investigating detectives specifically testified at the suppression hearing that Lubking was not even known to the police and Lubking was never suspected by the police as having any criminal culpability in the murder. (N.T. 7/26/88, 213, 234, 245-246). As the court below noted, " . . . Lubking was not scheduled to be interviewed as part of the investigation, thus belying Matteo's argument that Lubking cooperated to deflect suspicion from himself." *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 894 (3rd Cir. 1999) (en banc), Petitioner's Appendix at 39a.

[34] *United States v. Brink*, 39 F.3d 419 (3d Cir. 1994); *Lightbourne v. Dugger*, 829 F.2d 1012 (11th Cir. 1987), *cert. denied*, 488 U.S. 934 (1988); *United States v. Taylor*, 800 F.2d 1012 (10th Cir. 1986), *cert. denied*, 484 U.S. 838 (1987).

The ruling by the Superior Court of Pennsylvania that Douglas Lubking did not deliberately elicit incriminating information from Matteo was not an unreasonable application of law to the facts in light of a review of the exact words used by Lubking during his portion of the telephone conversations,[35] and in light of the treatment of this term of art by other courts.[36]

If there was any error, it was harmless under the applicable legal standard.[37]

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[35] March 14, 1990 Opinion of the Honorable Charles B. Smith at 11-15 n.7.

[36] *Kuhlmann v. Wilson*, 477 U.S. 436 (1986); *United States v. Stevens*, 83 F.3d 60 (2d Cir. 1996); *United States v. Moore*, 917 F.2d 215 (6th Cir. 1990), *cert. denied*, 499 U.S. 963 (1991); *Commonwealth v. Hoffman*, 367 Pa. Super. 79, 532 A.2d 463 (1987), *appeal denied*, 518 Pa. 636, 542 A.2d 1366, *cert. denied*, 488 U.S. 928 (1988).

[37] *Brecht v. Abrahamson*, 507 U.S. 619 (1993). In addition to the evidence as outlined by Judge Smith in his March 14, 1990 Opinion at 1-4, the jury would have still heard testimony that less than one month prior to the murder of Mr. Calandriello, Mr. Lubking loaned his .22 caliber rifle to Matteo and it was never returned. Moreover, the jury would have heard testimony that Matteo called Mr. Lubking from Chester County Prison, and told Mr. Lubking that he had hidden the rifle and wanted Mr. Lubking to retrieve it. Obviously, there can be no argument that this evidence is subject to suppression, as it was obtained before Mr. Lubking spoke to Chester County authorities.

The jury would have still heard testimony that a .22 caliber rifle is consistent with the type of gun that killed Mr. Calandriello. (N.T. 9/7/88, 748-779). It can be argued that Matteo was in fact helped by the fact that the gun was found

CONCLUSION

WHEREFORE, Respondent, the District Attorney of Chester County, Pennsylvania, respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

DATE July 22, 1999

STUART SUSS, ESQUIRE
Attorney I.D. No. 25996
Deputy District Attorney
District Attorney's Office
17 North Church Street, Suite 218
Post Office Box 2748
West Chester, PA 19380-0991
(610) 344-6801

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and the test was inconclusive. Howard Montgomery, a ballistics expert, stated that due to excessive mutilation, a conclusive comparison could not be made: "Now, basically what I'm saying is there was insufficient markings to positively say that this was the gun[.] . . . However, there was no markings present on the test bullet that would lead me to believe that it was not the rifle[.]" (N.T. 9/7/88, 757-758). Matteo could still argue, and if fact did, that the gun was not the murder weapon. (R.379a-381a, 396a-406a). At no point on the tapes does Matteo confess to the crimes charged. Matteo always proclaimed his innocence.

Moreover, while Matteo argues that Mr. Lubking deliberately elicited information from him during the second taped conversation, Matteo does not argue that Mr. Lubking deliberately elicited any information from him during the first taped conversation. Consequently, the tape recording of the first conversation would not have been subject to suppression.

See also the factual finding of the trial judge regarding the inevitable discovery of the rifle. March 14, 1990 Opinion of the Honorable Charles B. Smith at 18.

Supreme Court, U.S.
FILED
AUG 24 1999
OFFICE OF THE CLERK

No. 98-2050

IN THE

Supreme Court of the United States

ANTHONY N. MATTEO,

Petitioner,

v.

SUPERINTENDENT, SCI ALBION;
The District Attorney of The County of Chester;
The Attorney General of The State of Pennsylvania,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

Of Counsel:

DAVID RUDOVSKY
KAIRYS, RUDOVSKY, EPSTEIN, MESSING & RAU
924 Cherry Street
Suite 500
Philadelphia, PA 19107
(215) 925-4400

WALTER M. PHILLIPS, JR.
Counsel of Record
ARLENE FICKLER
R. DAVID WALK, JR.
DEBORA C. FLIEGELMAN
HOYLE, MORRIS & KERR LLP
Attorneys for Petitioner
One Liberty Place
Suite 4900
1650 Market Street
Philadelphia, PA 19103
(215) 981-5700

154769

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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Respondents' Brief in Opposition (1) concedes that the first of the three questions presented by Petitioner's Petition for a Writ of Certiorari merits this Court's review, (2) does not contest the basis for seeking review of the third question, and (3) attempts to defeat review of the second question by raising a new argument that was rejected below. In short, their brief demonstrates that certiorari should be granted.

On the first question presented, respondents agree with petitioner that there is an irreconcilable conflict among the circuits regarding the meaning of 28 U.S.C. § 2254(d), and more importantly, agree with petitioner that the Third Circuit's interpretation and application of the statute was improper. Rather than disputing that certiorari should be granted, respondents' brief argues the merits of the question presented for review. Petitioner will address the merits of this question if this Court agrees with the parties that certiorari is warranted and grants review.

Respondents' argument concerning the third question presented does not dispute the showing made in the petition that the Third Circuit failed to follow the proper standard, established in this Court's precedents, for evaluating whether an error was harmless. Respondents argue that the error was in fact harmless, but the question presented for review is not whether the error was harmless; the question is whether the Third Circuit erred in determining whether a constitutional error was harmless by looking solely at the sufficiency of the other evidence, rather than determining whether the erroneously admitted evidence had a substantial effect on the jury as required by *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and *O'Neal v. McAninch*, 513 U.S. 432 (1995). Respondents' brief demonstrates the need for this Court to grant review to instruct the lower courts that harmless-error

analysis in this context must analyze the effect of the erroneously admitted evidence on the jury.

Concerning the second question, Respondents' Brief in Opposition raises one new issue, not addressed in the petition, that merits a brief reply. Respondents argue that petitioner's Sixth Amendment right to counsel had not attached when an agent of the police deliberately elicited incriminating information from him. This argument is contrary to the decisions of the Third Circuit and the district court, both of which concluded that petitioner's right to counsel had attached, Pet. App. at 36a, 87a; it is contrary to the decisions of the Pennsylvania courts, which "implicitly concluded that [the right to counsel] had" attached, Pet. App. at 34a; and it is contrary to this Court's decisions defining when the right to counsel attaches. Petitioner's Sixth Amendment right to counsel had in fact attached when the police and their agent deliberately elicited incriminating information from him after he had been charged with the crime, was incarcerated and was represented by counsel.

This Court has long held that the Sixth Amendment right to counsel attaches at the initiation of judicial criminal proceedings against the defendant. *See Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972) (plurality); *McNeil v. Wisconsin*, 501 U.S. 171, 180-81 (1991) ("The Sixth Amendment right to counsel attaches at the first formal proceeding against an accused."). Those criminal proceedings are initiated by way of formal charge, preliminary hearing, indictment, information or arraignment. *Moran v. Burbine*, 475 U.S. 412, 431 (1986); *Kirby*, 406 U.S. at 689. Thus, "after the first charging proceeding, the government may not deliberately elicit incriminating statements from an accused out of the presence of counsel." *Moran*, 475 U.S. at 431. Once a warrant

has been issued for the arrest of the accused, and he has been arraigned on that warrant before a judge and committed by the court to confinement in jail, judicial proceedings have been initiated and the Sixth Amendment right to counsel has attached. *Brewer v. Williams*, 430 U.S. 387, 399 (1977).

In this case, Anthony Matteo was arrested on January 20, 1988 upon a complaint filed that day and was arraigned the same day, as required by Rule 123 of the Pennsylvania Rules of Criminal Procedure. As the respondents acknowledge, and as is required in Pennsylvania, Matteo was brought before the issuing authority for the purposes of advising him of his right to counsel, informing him of the charges he faced and scheduling a preliminary hearing. (Bail would also have been set had Matteo been charged with bailable offense.) Pa. R. Crim. P. 140. Matteo's Sixth Amendment right to counsel had therefore attached as of January 20, 1988, more than a week before the government elicited incriminating statements from Matteo out of the presence of counsel.[1]

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1. Respondents also make the untenable argument that a finding that the Sixth Amendment right to counsel had attached in this case constitutes a "new rule" that is barred by the doctrine of *Teague v. Lane*, 489 U.S. 288 (1989). As discussed above, however, the law is firmly established and quite clear that the right to counsel had in fact attached at the time the government here elicited Matteo's incriminating statements, so the *Teague* doctrine does not come into play.

For these reasons, as well as for the reasons stated in the petition, Anthony Matteo respectfully urges this Court to grant his petition for certiorari and reverse the judgment below.

Respectfully submitted,

WALTER M. PHILLIPS, JR.
Counsel of Record
ARLENE FICKLER
R. DAVID WALK, JR.
DEBORA C. FLIEGELMAN
HOYLE, MORRIS & KERR LLP
Attorneys for Petitioner
One Liberty Place
Suite 4900
1650 Market Street
Philadelphia, PA 19103
(215) 981-5700

Of Counsel:

DAVID RUDOVSKY
KAIRYS, RUDOVSKY, EPSTEIN,
MESSING & RAU
924 Cherry Street
Suite 500
Philadelphia, PA 19107
(215) 925-4400